APPEAL NO. 031370
FILED JULY 16, 2003

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq*. (1989 Act). A contested case hearing was held on May 1, 2003. The hearing officer resolved the disputed issues by deciding that the appellant (claimant) attained maximum medical improvement (MMI) on April 11, 2001, with a 12% impairment rating (IR). In his appeal, the claimant asserts error in the hearing officer's determination of his MMI date and IR. In its response to the claimant's appeal, the respondent (carrier) urges affirmance.

DECISION

Reversed and remanded.

The parties stipulated that the carrier accepted a right knee injury as compensable and that the claimant underwent a replacement of his right knee on _____. The hearing officer found that the designated doctor, Dr. E, examined the claimant on July 6, 2001, and certified that the claimant attained MMI on April 11, 2001, and assessed an IR of 12% and declined to change his opinion after being made aware of the claimant's subsequent total knee replacement. The evidence reflected that the designated doctor was sent two requests for clarification by the Texas Workers' Compensation Commission (Commission) and refused to include the claimant's knee replacement in his assessment of the IR. Dr. E initially declined to change his opinion because he mistakenly believed the knee replacement occurred after statutory MMI. After a second request for clarification, Dr. E stated that the surgery did not change his opinion and the "total knee replacement has not apparently significantly reduced [the claimant's] pain nor improved his function in his right knee . . . ."

Sections 408.122(c) and 408.125(e) of the 1989 Act provide that a report of a Commission-appointed designated doctor shall have presumptive weight on the issues of MMI and IR and the Commission shall base its determination on such report unless the great weight of other medical evidence is to the contrary. The Appeals Panel has stated that the great weight of the other medical evidence requires more than a mere balancing or preponderance of the evidence; that no other doctor's report, including a treating doctor's report, is accorded the special presumptive status; that the designated doctor's report should not be rejected absent a substantial basis for doing so; and that medical evidence, not lay testimony, is required to overcome the designated doctor's report. Texas Workers' Compensation Commission Appeal No. 960817, decided June 6, 1996; Texas Workers' Compensation Commission Appeal No. 94835, decided August 12, 1994. The claimant argues that the designated doctor failed to properly rate the compensable injury because he refused to consider the claimant's knee replacement. It is undisputed that the claimant's compensable injury was to his right knee and that he underwent a replacement of his right knee. Table 36 of the Guides to the Evaluation of Permanent Impairment, third edition, second printing, dated February

1989, published by the American Medical Association (AMA Guides 3rd edition) provides a specific impairment for a knee replacement. Dr. E's assessment of MMI and IR is against the great weight of the medical evidence because he refused to include impairment according to the AMA Guides 3rd edition for the claimant's knee replacement.

In Texas Workers' Compensation Commission Appeal No. 94966, decided September 6, 1994, the Appeals Panel stated "a second designated doctor is rarely appropriate and should be restricted to situations where, for example, the first selected designated doctor cannot or refuses to properly apply the AMA Guides [appropriate edition of the Guides to the Evaluation of Permanent Impairment, published by the American Medical Association] (Texas Workers' Compensation Commission Appeal No. 93045, decided March 3, 1993), particularly after being asked for clarification or additional information concerning the report." We recognize that Section 408.125(e) states that "[i]f the great weight of the medical evidence contradicts the impairment rating contained in the report of the designated doctor chosen by the commission, the commission shall adopt the impairment rating of one of the other doctors." However, the intent of the statute and rules appears to be that a designated doctor shall be selected to decide the IR issue when there is a dispute.

In the instant case the rating assessed by the carrier's required medical examination doctor was given prior to the claimant's knee replacement. The IR and MMI date assessed by the claimant's treating doctor does not provide a narrative report detailing the findings of the certifying examination and an explanation of the analysis performed to find whether MMI was reached. Additionally, although in correspondence dated March 10, 2003, the treating doctor assessed an IR under both the AMA Guides 3rd edition and Guides to the Evaluation of Permanent Impairment, fourth edition (1st, 2nd, 3rd, or 4th printing, including corrections and changes as issued by the American Medical Association prior to May 16, 2000) (AMA Guides 4th edition), the Report of Medical Evaluation (TWCC-69) noted certification of MMI and IR based on the AMA Guides 4th edition. As the initial MMI/IR certification was made using the AMA Guides 3rd edition, in accordance with Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 130.1(c)(2)(B)(ii) (Rule 130.1(c)(2)(B)(ii)), the treating doctor should have relied on the AMA Guides 3rd edition as well. Given that the designated doctor has failed to comply with the AMA Guides 3rd edition by refusing to include a rating for the claimant's knee replacement and there is not a valid IR to adopt from another doctor, we remand for the appointment of a second designated doctor to determine MMI and IR.

Pending resolution of the remand, a final decision has not been made in this case. However, since reversal and remand necessitate the issuance of a new decision and order by the hearing officer, a party who wishes to appeal from such new decision must file a request for review not later than 15 days after the date on which such new decision is received from the Commission's Division of Hearings, pursuant to Section 410.202 which was amended June 17, 2001, to exclude Saturdays and Sundays and holidays listed in Section 662.003 of the Texas Government Code in the computation of

the 15-day appeal and response periods. *See* Texas Workers' Compensation Commission Appeal No. 92642, decided January 20, 1993.

The true corporate name of the insurance carrier is **INSURANCE COMPANY OF THE STATE OF PENNSYLVANIA** and the name and address of its registered agent for service of process is

CORPORATION SERVICE COMPANY
800 BRAZOS, SUITE 750, COMMODORE 1
AUSTIN, TEXAS 78701.

_____
Margaret L. Turner
Appeals Judge

CONCUR:

_____
Elaine M. Chaney
Appeals Judge

_____
Chris Cowan
Appeals Judge